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SUPREME COURT, U.S.

NO. 79-5940

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

ROOSEVELT ESAU TURNER,

PETITIONER,

vs.

ROBERT A YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY,

DEFENDANT.

PETITION FOR WRIT OF CERTIORARI
AND FOR A WRIT OF HABEAS CORPUS
TO THE FOURTH CIRCUIT COURT OF APPEALS

Roosevelt Esau Turner
ROOSEVELT ESAU TURNER, ASSISTED

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ROOSEVELT ESAU TURNER,

PETITIONER,

vs.

79-5940

ROBERT A. YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY,

DEFENDANT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Roosevelt Esau Turner, pursuant to Rule 53 and 18 U.S.C. 3006A(d) (6), asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs, and to proceed in forma pauperis. Petitioner does not have assistance of counsel, but was assisted in the District Court and on appeal to the United States Court of Appeals for the Fourth Circuit.

Dated: 1-10-80

RESPECTFULLY SUBMITTED

Roosevelt Esau Turner
ROOSEVELT ESAU TURNER, ASSISTED

79-5940

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v.

ROBERT A. YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO APPEAL IN FORMA PAUPERIS

STATE OF VIRGINIA:

1. That Roosevelt Esau Turner is presently incarcerated in Richmond, Virginia, and is a citizen of the United States of America.

2. That Petitioner was granted leave to file in forma pauperis in the United States District Court, Richmond, Virginia, and in the United States Court of Appeals for the Fourth Circuit.

3. That because of his poverty, Roosevelt Esau Turner is unable to pay the cost of appeal in the above styled and numbered cause.

4. That Petitioner is unable to give security for cost of appeal.

5. That Petitioner's Motion for Leave to Appeal in forma pauperis is not filed for the purpose of delay but in order that justice might be done.

Roosevelt Esau Turner
ROOSEVELT ESAU TURNER, ASSISTED

NOTARY PUBLIC

Sworn and subscribed to before me this 10th day of January, 19 80.

I am a notary public in and for the City of Richmond, Virginia.

My commission expires: 3/4/83.

Margaret G. Brown
NOTARY PUBLIC SIGNATURE/SEAL

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1980

NO. 79-8180

ROOSEVELT ESAU TURNER,

PETITIONER, 79-5940

v.

ROBERT A. YOUNG, ACTING WARDEN,
VIRGINIA STATE PENITENTIARY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Roosevelt Esau Turner, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case on October 18, 1979

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction is attached as Appendix A.

JURISDICTION

Petitioner exhausted his state remedies in The Supreme Court of Virginia on December 13, 1977. The Memorandum-Opinion of the United States District Court, Richmond Division, was entered on March 16, 1979, Case No. 78-0551-R. The United States Court of Appeals for the Fourth Circuit DENIED petitioner's petition for a rehearing on November 20, 1979, Appendix B. The Jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Was petitioner denied a fair and impartial trial by jury by the admission by the court of a claimed prior statement of petitioner that was inconsistent with his alibi defense when he himself did not testify, and (a) when said claimed statement, if made by petitioner (ARGUENDO) was taken in violation of his Miranda rights ?

2. Was the evidence insufficient as a matter of law to sustain the convictions ?

STATEMENT OF THE CASE

Defendant, Roosevelt Esau Turner, was charged with murder in the first degree of his wife, Ruth Anna Turner, and the use of a firearm during the commission of same. Petitioner also was charged with malicious wounding of his step-daughter, Artorita Smith Bey. All offenses were allegedly to have taken place on the 4th day of January, 1977, in the City of Richmond, Virginia.

The Commonwealth's evidence indicated that the offenses had taken place at approximately 8:00 P.M. and that the time of death was approximately 8:00 P.M.

Upon hearing the 11:00 P.M. news report Petitioner requested his sisters to drive him to Richmond so he might find out what had happened. It was during this return trip to Richmond that the police stopped Audrey Turner's vehicle and arrested the defendant for the alleged shootings.

Samuel Turner, Jr., stated under oath that he met the petitioner at about 7:00 P.M. on January 4, 1977, and that he took the petitioner directly to his mother's house in Chesterfield County on Courthouse Road. This witness stated that his sisters, Helen Conner and Juanita Turner, were present when he and the petitioner arrived.

Helen Conner and Juanita Turner both testified without discrepancy that they were present when Roosevelt E. Turner arrived at 7711 Courthouse Road in Chesterfield County at about 7:30 P.M., the evening of the murder and alleged malicious wounding. They testified that petitioner arrived with Samuel Turner, Jr. who dropped him off at the residence. They both further testified that petitioner appeared undisturbed and normal to them until the point when they all heard about Ruth Turner being shot on the 11:00 P.M. news.

Audrey Turner, petitioner's mother, testified that she was not present when the defendant first arrived at her home, but that at 9:30 P.M. she arrived and found Juanita, Helen and Roosevelt Turner watching television.

The only eye witness claimed by the Commonwealth was the step-daughter of petitioner, Artorita Smith Bey, whose testimony was uncooroborated.

However, the Commonwealth called Detective D.C. Gery on rebuttal and said detective claimed that he saw petitioner on the 5th of January at 5:25 A.M. in the early morning, and before petitioner had ever been before a magistrate or had been advised of his Miranda rights, and at this time that petitioner had told said detective that he had been in a Beer Garden, Bar, etc, called

"Gregory's". Said testimony of said detective was allowed into evidence over defense counsel's objections, and at the time the trial judge stated that even though the Supreme Court might reverse it he was going to allow Detective D.C. Gery's hearsay testimony, which was perjured testimony.

No Miranda rights warning card was ever introduced to substantiate that petitioner had been advised of his rights prior to being questioned by Detective Gery prior to allegedly giving the claimed statement to Gery. The records themself are devoid of any Miranda rights card signed by petitioner, or any reduced statements from tapes, etc.. The only claimed evidence that Detective Gery had in court was notes he claimed he had made, and among these he affirmed that petitioner was stopped by the police in Helen Connor's vehicle on Route 360 driving towards the City of Richmond sometime after 11:00 P.M. on the 4th of January, 1977.

Additionally, no murder weapon was ever found, and your petitioner did not own any kind of firearm.

REASONS FOR GRANTING THE WRIT

Your Petitioner states that he did not give any statement to Detective D.C. Gery that he was in Gregory's on the evening of the 4th of January, 1977. Petitioner further declares that Detective D.C. Gery gave perjured testimony to the jury concerning this matter. It is petitioner's firm belief that the Commonwealth knew that petitioner would be acquitted of the charges based on the uncooroborated testimony of his step-daughter and that the Commonwealth put said Detective on the witness stand, on rebuttal, to cooroborate petitioner's step-daughter for this reason.

The statement claimed to have been made by the petitioner to Detective D.C. Gery that petitioner was in Gregory's should have never been admitted into evidence without[1] first establishing the proof that petitioner had got up at 5: 26 A.M. in the early morning , some 4 or 5 hours after his arrest, and intelligently made such a statement, and[2] without proof that petitioner hadwaived his Miranda rights and gave such a statement, which he did not.

There is absolutely no proof whatsoever that petitioner was advised of his rights pursuant Miranda v. Arizona, 384 U.S. 436(1966). Petitioner's right to counsel attached when he was placed in custody, Escobedo v. Illinois, 378 U.S. 478(1964). ACCORDINGLY, the court stated in Lamb v. Commonwealth, 217 Va. 307, 310:

> " ONLY WHEN AFFIRMATIVE WAIVER OF THE MIRANDA RIGHTS MAY THE POLICE QUESTION A PRISONER" SEE Clark v. Oliver, D.C. Va. (1972), 346 F.Supp. 1345, also.

Surely, this does not mean that a Detective, or and other law enforcement official can come into a courtroom with some notes he doesn't even show anyone, even if the notes were admissible, and "suggest" by the notes that a defendant waived his rights, intelligently, etc. and gave a statement to that official which is inconsistent to defendant's alibi defense, and which is so highly prejudicial to the defendant as to have a bearing on the outcome of a case where defendant's life and liberty are at stake, and especially where the suggestability of a law official's testimony acts as the scale which tips the balance of justice . Surely the four(4) witnesses for the petitioner and their testimony had some degree of favorable doubt in the minds of the jury before Detective D.C. Gery gave his perjured testimony to cooroborate the petitioner's step-daughter!

MOREOVER, the Supreme Court stated in Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908(1964) as follows:

> "THE PHILOSOPHY OF EACH AMENDMENT AND OF EACH FREEDOM IS COMPLIMENTARY TO, ALTHOUGH NOT DEPENDENT UPON, THAT OF THE OTHER IN ITS SPHERE OF INFLUENCE—THE VERY LEAST THAT TOGETHER THEY ASSURE IN EITHER SPHERE IS THAT NO MAN IS TO BE CONVICTED ON UNCONSTITUTIONAL EVIDENCE . . . . "

And, the court stated in Longer v. State of N.C., 260 F.Supp. 970:

> " (I)T IS NOW EXIOMATIC THAT A DEFENDANT IN A CRIMINAL CASE IS DEPRIVED OF DUE PROCESS OF LAW IF HIS CONVICTION IS FOUNDED, IN WHOLE OR IN PART, UPON AN INVOLUNTARY CONFESSION, WITHOUT REGARD FOR THE TRUTH OR FALSITY OF THE CONFESSION, Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760, AND EVEN THOUGH THERE IS AMPLE EVIDENCE ASIDE FROM THE CONFESSION TO SUPPORT THE CONVICTION."

WHEREFORE, for the reasons stated herein your petitioner respectfully prays that a Writ of Certiorari be granted.

Petitioner argues in his second claim as to the sufficiency of the evidence that the Fourth Circuit Court of Appeals did not render a fair opinion in affirming petitioner's convictions under the new doctrine set by the United States Supreme Court in Jackson v. Virginia, 47 U.S.L.W. 4883 (U.S), No. 78-5283, June 28, 1979.

Petitioner asks this Honorable Court to find that based"upon the evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."

In the first instance the petitioner avers that the personal feelings of the trial judge that petitioner and all of his witnesses were lying (Transcript Page 114) prejudiced the petitioner so critically as to deny him a fair trial because as the records show it was his personal feelings

prompted him to allow Detective D.C. Cery's testimony into evidence, even if"the Supreme Court might reverse the case" (Transcript Page 114), inter alia.

Secondly, your petitioner avers that a rational trier of fact would not accept the biased testimony of petitioner's step-daughter, who admitted that the petitioner had never threatened or harmed her in any way. Artorita Smith Bey even admitted on cross examination that she had hit your petitioner in the head with an eas-tray, she did not like him, or had she ever gotten along with him. She even stated she hated the petitioner, and that petitioner had been the cause of her being forced to move from her mother's home because she smoked Marihuana, was a disobedient deliquent, etc..

Thirdly, petitioner avers that no rational trier of fact would have found him guilty based on the uncooroborated testimony of his step-daughter, especially when the Commonwealth's Attorney did not refute the alibi defense of petitioner established through his four(4) witnesses. Their testimony was sincere and given without compulsion. Little or no variation existed between them. All testified that the petitioner had been with them in Chesterfield and that when he learned of his wife's murder he immediately proceeded to return to Richmond to see what had happened. Even the police report confirmed that he was heading towards Richmond when arrested. Petitioner contends that Miss Bey's testimony was entirely uncorroborated and that having shown her hatred and propensity to lie against a man who she did not like that the verdicts of guilty rendered by the jury was inproper and incredible, and without regard to the overwhelming evidence of innocence presented by the petitioner, therefore said verdicts were not the product of a rational trier of fact and the jury could not have rationally found the essential elements of the crimes beyond a reasonable doubt.

In conclusion, and with further reference to petitioner's first allegation, and further in support of this second allegation pertaining to the sufficiency of the evidence, petitioner states that the jury was duly influenced to a degree sufficient to prejudice the petitioner and sway the minds of the fact finders by the court's admission into evidence of the statement alleged by Detective D.C. Gery when he had not been subpoenaed, and on rebuttal, for the purpose of impeaching petitioner when he did not take the stand in his own defense.

Detective Gery was called by the Commonwealth as a rebuttal witness (Tr.P. 115). At this time a statement attributed to the defendant was permitted

over objections and arguments by defense counsel, and under extraordinary circumstances due to the trial judge's own personal feelings concerning the matters of the case, for the purpose of impeaching the witnesses called by the defense(Tr.P. 118). Miss Bey's testimony was already discredited.

Roosevelt Turner did not take the stand in his defense and, therefore, it cannot be said that the Commonwealth offered this statement into evidence as a prior inconsistent statement. Likewise, it is not and cannot be considered a prior inconsistent statement of the defense witnesses since they did not make it.

The statement clearly amounted to inadmissible hearsay and was not properly introduced, inadmissible, not proper evidence to be considered by the jury, as it did not amount to a prior inconsistent statement of any of the defense witnesses. Williams v. Commonwealth, 193 Va. 764 (1952); Crooty v. Commonwealth, 135 Va. 508 (1923).

In the case of Powers v. Commonwealth, 182 Va. 669 (1944) the Court pointedly stated that hearsay statements are not admissible in evidence. Id. at 675, the Court in this case went on to say:

> "WE CANNOT SAY WHAT EFFECTS THE HEARSAY EVIDENCE MAY HAVE HAD UPON THE MINDS OF THE JURORS..... IT MAY HAVE BEEN HIGHLY PREJUDICIAL AND FOR THAT REASON IT WAS ERROR TO ALLOW ITS ADMISSION FOR THE CONSIDERATION OF A JURY." Id.

Petitioner submits that officer Gery's testimony was highly prejudicial and destructive of this petitioner's rights. The testimony was not of a collateral nature but tended to bear squarely upon the defense set forth at trial by the petitioner's counsel. Therefore, the petitioner contends it could not be considered to be simply a harmless error which would not mandate a reversal.

It is respectfully submitted that the Court overstepped its legal limitations and erred in admitting this testimony over defense objections.

CONCLUSION

The petitioner, Roosevelt Esau Turner, prays that this Honorable Court will see fit to grant him a Writ of Certiorari in this matter based upon either or both of the Assignments of violations of his Constitutional rights as set forth in this petition.

Roosevelt Esau Turner R.
ROOSEVELT ESAU TURNER, ASSISTED

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Unpublished Opinion of the Fourth Circuit
Court of Appeals of October 18, 1979

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-8180

Roosevelt Esau Turner,

Appellant,

versus

Robert A. Young, Acting Warden,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Submitted August 20, 1979. Decided October 18, 1979

Before HAYNSWORTH, Chief Judge, WINTER and PHILLIPS, Circuit Judges.

(Roosevelt Esau Turner, Appellant Pro Se. Robert H. Herring, Jr., Assistant Attorney General, Attorney for Appellee.)

APPENDIX "A"

PER CURIAM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court.[1/] Turner v. Young, No. 78-0551-R (E.D. Va. Mar. 16, 1979).

DISMISSED.

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[1] Although the district court evaluated the sufficiency of the evidence in light of Williams v. Peyton, 414 F.2d 776 (4th Cir. 1976), the evidence was sufficient under the standard set forth in Jackson v. Virginia, 47 U.S.L.W. 4883 (U.S. June 28, 1979).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-8180

FILED

NOV 30 1979

U. S. Court of Appeals
Fourth Circuit

Roosevelt Esau Turner,

Appellant,

versus

Robert A. Young, Acting Warden,

Appellee.

O R D E R

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Phillips, for a panel consisting of Judge Haynsworth, Judge Winter, and Judge Phillips.

For the Court,

/s/ William K. Slate, II

CLERK

APPENDIX "B"

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 13th *day of* December, 1977.

The petition of Roosevelt Esau Turner for a writ of error and supersedeas to judgments rendered by the Circuit Court of the City of Richmond, Division II, on the 19th day of May, 1977, in prosecutions by the Commonwealth against the said petitioner for felonies (Cases 77-106-F, 77-107-F and 77-108-F), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the said court, which court shall allow court-appointed counsel the sum of $100 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the costs to be taxed by the clerk of this court and the costs to be assessed in this case by the clerk of the court or courts below.

Record No. 771284

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard R. Brunk
Deputy Clerk

Costs due the Commonwealth by plaintiff in error in Supreme Court of Virginia:

Attorney's fee	$100.00 plus his costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Richard R. Brunk
Deputy Clerk

APPENDIX "C"